United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-2045

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 17, 17A, AND 17B, AFL-CIO,
Respondent.

On Application for Enforcement of an Order of The National Labor Relations Board

RESPONDENT'S BRIEF

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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

On April 19, 1974, the National Labor Relations Board issued an order directing the respondent, International Union of Operating Engineers, Local No. 17, 17A and 17B, AFL-CIO to cease and desist from inducing the employees of any other person to strike, or from threatening by any means any

person with an object of forcing any person to cease doing business with the charging party, Firelands Sewer and Water Construction Company, Inc. Firelands alleged a secondary boycott in violation of section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act.

For the reasons stated below, however, the Board, as a matter of law, lacked substantial evidence of a secondary boycott by respondent. Therefore, the Court should deny enforcement of the Board's order.

STATEMENT OF FACTS

The charging party, Firelands Sewer and Water Construction Co., Inc. (hereinafter Firelands) was awarded a contract by the Buffalo Sewer Authority (hereinafter BSA) for the removal of certain waste material from Squaw Island to another location of the Authority approximately six miles away, the Tifft Street Farm (3).* Prior to the award of the contract, having received information through local construction reports, respondent learned that Firelands was to be awarded the contract (T115). As a result of that information, a meeting was arranged with representatives of the BSA (37; T8). That meeting was held on July 11, 1970 (T8).

During the course of that discussion, respondent's business representative, Thomas McPartlan, remarked that if Firelands were awarded the contract, the respondent would be obliged to engage in informational picketing (6).

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* Numbers in parentheses refer to pages of the printed appendix filed in this Court. Numbers in parentheses preceded by "T" refer to the stenographic transcript of the proceedings before the Administrative Law Judge, filed in this Court with the original record.

Squaw Island is situated in the Niagara River and is separated from the mainland by what is known as the Black Rock Channel (7). Acce to this rather small island is by way of two bridges, one at either end of the island (7-8). One may, of course, also reach the island by water route, the channel being navigable. Both bridges connect with a single road which runs parallel to the channel on the east (mainland) side of the island (8). The area used by BSA for disposal is surrounded by a fence. A gate near a number of BSA buildings is situated approximately 600 to 700 feet north of the sourtherly most bridge (8; T26). Paralleling the road and lying between the road and the channel is a wall approximately three to four feet in height (48-49).

On October 9, 1973, the day when picketing began at Squaw Island, Firelands' employees were in the process of erecting a dock on the channel side of the island between the two bridges. The dock is approximately 3,000 feet north of the southerly most bridge (44). On October 9 and thereafter, the pickets were located at the mainland end of the northerly most bridge and, on the island, between the southerly

most bridge and the Authority gate (45). The pickets ranged from 50 to 200 feet south of the Authority gate. Prior to the Squaw Island picketing, respondent had been picketing the ultimate place of deposit, Tifft Street Farm, since September 25, 1973 (T30) There was no complaint of illegality regarding the picketing at the Tifft Street Farm location (3).

On Squaw Island the pickets were considerably removed from Firelands' actual work site by fences and the nature of the work site. Indeed, in both instances of land picketing at Squaw Island, the pickets were never able to be closer than 2,000 feet from the actual work site. Thus, on the Friday preceding the actual picketing, McPartlan arranged for boats to carry pickets in the channel in the area of the job site (T122). That is, the arrangements were made October 5, 1973 when McPartlan learned of the work being undertaken at the Squaw Island site (T121, 123).

Firelands' employees came to work by using the two access bridges (41). Apparently, Firelands' employees did not use the channel to get to work, but only for the erection of the dock into the channel at the job site. On three occasions

the captain of a Dunbar & Sullivan Dredging Company tug boat refused to proceed to the job site upon encountering the picket boat in the channel (14). Dunbar was a subcontractor.

There was some controversy concerning a conversation which allegedly occurred between Dunbar's representative, Albert Headley, and one of respondent's pickets, James Mann. There is no dispute that the first question that Headley asked the pickets was who was being picketed (14-15). Similarly, there is no dispute that Mann's initial answer to that question was "Firelands." The dispute centered around a subsequent question concerning whether Dunbar was being picketed. Headley's question was asked over the din of the tug boat's engine and the picket boat motor. Simultaneously, the tug's captain was backing his boat into a turn, intent on avoiding the picket line. The Board found that Mann answered "Yes, sir" in response to Headley's question whether Dunbar was being picketed (14-16).

Another subcontractor, Herbert F. Darling, Inc., whose employees were to be used for piledriving work at the job site, had a marshalling area on the mainland near the southerly most bridge. Those Darling

employees, although reporting to work each day, refused to perform any work (12-13).

In all instances of picketing, the picket signs were identical (8-9). The signs read:

> "Employees of Firelands Sewer and Water Construction Company, Inc. are employed to perform Operating Engineers work on this job under wage and other conditions of employment inferior to those enjoyed by employees represented by the Operating Engineers Local 17, 17A, 17B, affiliated with the AFL-CIO." (8-9)

On these facts, the Administrative Law Judge found and concluded that the respondent's statement on July 11, 1973 about informational picketing was a threat and that the picketing of the Squaw Island job site was done with the intent to induce or encourage employees of BSA, Dunbar and Darling to strike or engage in a refusal to perform services for their respective employers and threatened, coerced and restrained BSA, Dunbar and Darling with an object of forcing BSA and Dunbar to cease doing business with Firelands and forcing Darling to cease doing business with Dunbar in order to force or require Dunbar, in turn, to cease doing business with Firelands, thereby

violating §8(b)(4)(i) and (ii)(B) of the Act. The Board adopted these findings and conclusions.

POINT I

THE PRE-PICKETING STATEMENT, HELD NOT TO BE A VIOLATION, DEMONSTRATES THE LEGALITY OF THE PICKETING'S PURPOSE.

The Board found that during the course of a meeting on July 11, 1973, respondent's business representative, McPartlan, made a statement that if Firelands were awarded the contract, respondent would be obliged to engage in informational picketing. The Board ultimately held that this statement did not constitute a threat which was unrestricted in scope and which contemplated picketing the entire job site including future phases and any employers working at the job site (29).

The record in this case overwhelmingly demonstrates that the picketing, by reason of its timing, location of pickets and legend on the picket signs, was directed only at Firelands. The business representative, McPartlan, simply stated in the presence of members and representatives of the BSA that if Firelands, a non-union contractor were awarded the contract, his union would be obliged to engage in informational picketing (37, 66).

The contrast between statements that picketing would occur and a threat of economic pressure against neutral employers has been frequently discussed by the Board. See, e.g., Local Union 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent and V. G. Scalf, 172 NLRB No. 123, 1968-2 CCH NLRB ¶20068. In Scalf two markedly different situations were reviewed by the Board. In the first, a union agent stated to the president of a neutral subcontractor that if he used the primary employer with whom the union had a dispute, the union would use "economic pressure." The Board determined this was not simply notice to the neutral of prospective strike action, bu rather constituted a thr at of unrestricted economic action of an unspecified nature against the secondary employer. The Board found that kind of threat to be proscribed by §8(b)(4).

On the other hand, a number of other situations were reviewed in Scalf where the respondent's agent had simply said that if the secondary employers hired the primary with whom the union had a dispute, they would picket all of the primary work sites. The Board found this statement not to be violative of the Act since picketing of that nature obviously

would be lawful and the threat to engage in that kind of picketing similarly would be lawful.

In NLRB v. Local 825, International Union of Operating Engineers, AFL-CIO, 326 F.2d 218 (3d Cir. 1964), the court further defined proscribed areas of activity. There the Third Circuit reviewed a situation where operating engineers had left their jobs with secondary employers to prevent the use of power driven equipment by a subcontractor's non-union employees. The Third Circuit held that there was no explicit demand by the respondent to the secondaries to cease doing business with the primary. The court noted that there was no record evidence which supported a finding that any union representative ever discussed the possibility of the cessation of receiving services from or doing business with a non-union contractor.

In still another case involving the Operating Engineers, the Board refused to find a threat in the proscribed area of §8(b)(4) where the union business agent approached the managing supervisor of a secondary employer and requested that the secondary not use a product of the primary. Local 324,

International Union of Operating Engineers, AFL-CIO v. Brewer's City Coal Dock, 131 NLRB No. 36, 1961 CCH NLRB ¶9914. See also McLeod v. Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 41 LC ¶17836.

Of particular relevance here is the fact that the secondary employers who might have been affected by the respondent's activities were Dunbar and Darling. Neither of those secondary or neutral employers had representatives at the meeting with the BSA. There is absolutely no evidence of any conversations with representatives of those employers to the effect that the respondent desired them to cease doing business with the primary, Firelands. And, there is absolutely no evidence of any conversation by McPartlan, or any other union representative, with either of those two subcontractors concerning any matter, let alone conduct proscribed by §8(b)(4).

Picketing began in September, 1973 at the Tifft Street Farm location. There is no allegation of illegality with respect to that picketing. And the entire picketing effort at the Squaw Island location was directed at Firelands according to the undisputed testimony contained in the record

of this case.* There is absolutely no evidence even suggesting that McPartlan asked that Dunbar or Darling should cease doing business with Firelands.

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* The Board did, however, attempt to justify its conclusion by finding that one of the pickets had advised a representative of Dunbar that the picketing was against them. We have discussed that finding in Point III, infra.

POINT II

ALTHOUGH SEEMINGLY INSIGNIFICANT, IT WAS ERROR FOR THE BOARD TO FIND THAT THE PICKETS WERE ESTABLISHED AT THE AUTHORITY'S GATE.

The testimony demonstrates that the pickets in the first instance were somewhere between the gate and a point approximately 50 feet south of the gate. On the second day of picketing, they expanded the area to approximately 250 feet south of the authority's gate (46). The pickets walked with their signs along the road near the gate. The road is used by Firelands' employees to reach their worksite. A four foot wall separated the road from the channel wherein the secondary employer's barge was located.

The pickets traveled 100 to 150 feet along the road in their picketing situs and that entire situs was separated from the employees of the secondary employer by the four foot wall. The topography of the island and structures placed thereon screened the pickets from any employees who may have been aboard a neutral employer's barge.

POINT III

THE BOARD HAS ATTACHED UNWARRANTED SIGNIFICANCE TO THE DISPUTED PORTION OF THE CONVERSATION BETWEEN HEADLEY AND A PICKET.

The Board erroneously bottomed its decision on an alleged statement by a picket that a secondary employer was also being picketed. The evidence of that statement was so tenuous that the Board's reliance on that evidence was error as a matter of law. For a month, the operating engineers picketed the primary employer, Firelands. Their picket signs clearly conveyed the information that the dispute was between Firelands and the respondent. During that month, there occurred not one incident or conversation which in any way suggested that the respondent was picketing any employer, save Firelands.* Despite this perfect track record, the Board has determined that one trumped-up statement attributed to one of the pickets under highly suspicious circumstances was sufficient to sustain the charge of secondary boycotting.

On November 14, 1973 one of Dunbar's tugboats entered the Black Rock Channel and steamed toward the worksite. Farther

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* On one occasion some of the pickets went aboard a Dunbar barge, but there was no picket activity of any kind.

along, a picket boat was plying the channel with its informational picket signs in full display (75). As the tug closed on the picket boat, the captain of the tug elected not to cross the picket line and began to come about (75). Albert Headley, a Dunbar management official aboard the tug, shouted over its engine at a picket in the small picket boat. Headley asked who was being picketed. The picket responded by pointing at his sign and explaining that they were picketing the Firelands Company (76). As the tug moved off, Headley asked if they were picketing the Dunbar company. According to Headley, the picket responded in the affirmative. However, the circumstances of Headley's last inquiry demonstrated that either the picket did not hear him or misunderstood him.

In addition to the noise and direction of the tug boat, the picket boat was moving away to give the tug a wider berth (77). Moreover, another picket testified there was too much noise and that he was having trouble with the picket boat's motor (81).

The pickets' testimony, taken in conjunction with Headley's testimony that he was initially told they were picketing "Firelands," strongly refuted the allegation that

Dunbar was also being picketed. If the picket had meant to say that Dunbar was being picketed, why would he have answered Headley's first question by referring only to Firelands and by pointing to the picket sign which referred only to Firelands? And, finally, the fact that the picket obviously misunderstood Headley's question regarding Dunbar was demonstrated by the fact that there were no acts of picketing directed toward Dunbar either before or after this incident in the channel.

The record supports only one conclusion. The pickets announced they were picketing Firelands and only Firelands. Their picketing was solely primary in nature.

POINT IV

THE BOARD HAS MISAPPLIED ITS PRIOR DECISIONS AND PRIOR DECISIONS OF THE COURTS TO THE PICKETING IN THIS CASE.

Apparently reasoning in reverse, from the effect of the picketing, the Board has found that the picketing was directed at the secondary employers. In order to reach that conclusion, it has misapplied the Moore Dry Dock standards.* In that case, certain criteria were set forth for general guidance in determining principles to be applied in common situs picketing:

> ". . . (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing, the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer." (27 LRRM at 1110)

It is abundantly clear that all picketing was directed at the primary employer, Firelands. Picketing had

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* Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547, 27 LRRM 1108 (1950).

occurred since September, 1973 with signs identical to those used at the Squaw Island location (67). There is, of course, no question that Firelands was engaged in its business activity on Squaw Island at the time the picketing occurred, and there has been no effort whatever to demonstrate anything to the contrary. The picketing occurred at Squaw Island, which is owned by BSA, where Firelands had contracted to remove debris from the entire island.

Respondent's pickets covered those places where Firelands' employees had access to the job site: (1) the mainland end of the northerly most bridge, and (2) on the island, between the southerly most bridge and the Authority gate. On October 5, 1973 respondent's business representative, McPartlan, arranged for the picketing at the two places of land access. He also secured boats for picketing in the channel where Firelands' employees were erecting a dock. The picketing was purely informational.

There was no other place the pickets could have picketed at this location without special permission from BSA. There are two bridges giving access to the island and the pickets stationed themselves at both bridges. The actual worksite was on a dock projecting into the channel on

the east side of the island. The boat picketing provided informational picketing at the closest possible location to the situs of the primary work. Similar picketing at the Tifft Street Farm site, where other work by Firelands was being performed on the same contract, was not challenged in any way.

The relevant portions of the National Labor Relations Act are found in §8:

> "
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> * * *
>
> (b) It shall be an unfair labor practice for a labor organization or its agents -
>
> * * *
>
> (4). . .(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is -
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processer or manufacturer, or to cease doing business with any other person . . . ."

There follow the various provisos to §8(b)(4). The proscription of §8(b)(4) is directed at the specific evil

of a union's effort to force customers of secondary employers to cease patronizing that employer so that he in turn will cease dealing with the primary employer. N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, 377 U.S. 58, 63 (1964). Where the picketing at a so-called secondary location is clearly directed at the primary employer, and does not seek to disuade trade with another (secondary) employer at that site, it is not proscribed. (Ibid.) Services, as well as tangible products, are included in the meaning of §8(b)(4) language and the protection of the publicity proviso cannot be construed any narrower in coverage than the prohibition to which it is an exception. N.L.R.B. v. Servette, Inc., 377 U.S. 46 (1964). See also Great Western Broadcasting Corporation v. N.L.R.B., 356 F.2d 434 (9th Cir. 1966).

As the Supreme Court, quoting from Seafarers International Union v. N.L.R.B.,* stated in I.U.E. v. N.L.R.B., 366 U.S. 667, 673 (1961):

> "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all

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* 265 F.2d 585, 590 (D.C. Cir. 1959).

> persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment . . . have to enter the premises."

Three years after the General Electric case,* the Supreme Court had occasion again to consider the significance of the location of the pickets:

> "The location of the picketing, though important, was not deemed of decisive significance; picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees."**

The Supreme Court, quoting from N.L.R.B. v. Local 294 Internat'l Bro. of Teamsters, Etc.,*** wrote in the I.U.E. case:

> "Almost all picketing, even at the situs of the primary employer and surely

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* I.U.E. v. N.L.R.B., 366 U.S. 667 (1961).

** United Steel Workers of America v. N.L.R.B., 376 U.S. 492, 497 (1964).

*** 284 F.2d 887, 889 (2d Cir. 1960).

> at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." (366 U.S. at 673)

The Supreme Court's observation on secondary activity is particularly appropriate to this case:

> "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer." (Ibid.)

The Court also recognized the fact that:

> "The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade." (Ibid.)

Picketing in this case was confined to sites as close to the primary situs as the topography and methods of access to that site permitted. The tugboat captain refused to proceed to Firelands' dock. He did so before any conversation between Headley and the picket in the boat, and only upon seeing the informational picket sign in the picket boat. The Darling employees, without any explanation except

that they were aware of the dispute with Firelands, although reporting to work each day, refused to perform any work.

In every possible way under the circumstances involved in this matter, respondent complied with the provisions of Moore Dry Dock and other Board decisions setting the guidelines for common situs picketing. Its picketing was purely informational and was directed only at the primary employer. No effort was made to cause any subcontractor to cease doing business with Firelands. There is no illegality in the conduct of the respondent as defined in §8(b)(4) of the National Labor Relations Act.

CONCLUSION

On July 11, 1973 the respondent's representative, McPartlan, stated that informational picketing of Firelands would occur if Firelands were awarded the contract. At that time, there was no evidence whatever that any subcontractors had been engaged. The reference was only to Firelands. That statement cannot, under any view, constitute a threat to engage in illegal picketing and there is no doubt the picketing itself was directed only at the primary employer.

The locations of the pickets were as close as permitted to Firelands' worksite. The record is absolutely devoid of any effort to coerce or otherwise induce employees of other employers to cease doing business with Firelands. The respondent sought solely to advertise its dispute with Firelands. The fact that employees of neutral employers respected the picket line, cannot in any way be construed to render illegal lawful informational picketing.

The Court is respectfully urged to deny the Board enforcement of its order and grant such other and further relief as to the Court appears just and proper.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

November 29, 1974

RE: National Labor Relations Board vs International Union of Operating Engineers, Local No. 17, 17 A and 17 B, AFL-CIO

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

Johnson D. Hay , being duly sworn, deposes and says:

That he is associated with The Daily Record Corp. of Rochester, New York, and is over twenty-one years of age.

That at the request of Lipsitz, Green, Fahringer, Roll, Schuller & James Attorney(s) for Respondent (s)he personally served three (3) copies of the printed [~~Record~~] [Brief] [~~Appendix~~] of the above-entitled case addressed to:

John D. Burgoyne
John G. Elligers,
National Labor Relations Board
1717 Pennsylvania Ave.
Washington, D.C. 20570

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

.....John D. Hay.....

Sworn to before me this 29th day of November , 19 74.

Ellen A. Defendis

Notary Public
Commissioner of Deeds

ELLEN A. DEFENDIS, Notary Public
State of New York, County of Monroe
Commission Expires March 30, 19 75